Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1584

HENNEPIN BROADCASTING ASSOCIATES, INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

AMERICAN FEDERATION OF TELEVISION AND RADIO ARTISTS,
Intervenor-Respondent.

PETITION FOR WRIT OF CERTIORARI

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Comes now your Petitioner and respectfully shows the Court Pursuant to Rule 23 of the Supreme Court of the United States:

(a) That the following decisions were made herein:

(1) 215 N.L.R.B. 32, Dec. 6, 1974, D-9260.

(2) 225 N.L.R.B. 66, June 30, 1976, D-1266.

(3) Order of Enforcement (8th C.C.A.) Entered February 16, 1977.

(4) Order Denying En Banc Rehearing (8th C.C.A.) Entered March 11, 1977.

(5) Judgment Entered (8th C.C.A.) March 18, 1977.

(b) (i) Judgment of Eighth Circuit Court of Appeals, upon an Order dated February 16, 1977, entered March 18, 1977, enforcing 215 N.L.R.B. 32 (Dec. 6, 1974) ordering, among other things, reinstatement and back pay of ten FCC licensed engineer-announcers who conspired to (without authority from the FCC or the licensee) and did terminate public broadcasting from two federally-licensed radio stations and who issued, as part of said conspiracy, fraudulent (intentionally false and misleading) sign-off statements to the public in whose interest the stations were licensed and operated. (47 U.S.C.A. 151; See *Wyde, Inc. v. Bartell Broadcasting Corp.*, D.C.N.Y. 1961, 199 F. Supp. 773; *W. V. Division, Commercial Telegraphers Union, AFL, v. U.S.*, D.C.D.C., 1949, 87 F. Supp. 324, Aff'd. 70 S.Ct. 148, 338 U.S. 864, 94 L.Ed. 529.

(ii) Rehearing denied March 11, 1977.

(iii) Jurisdiction is conferred on this Court by Section 1254 of Title 28 U.S.C. Subsection (1):

". . . cases in the Courts of Appeals may be reviewed by the Supreme Court . . . by Writ of Certiorari . . ."

and by Section 160 of Title 29 U.S.C. Section (e):

". . . the same shall be subject to review . . . by the Supreme Court of the United States upon Writ of Certiorari. . ."

(c) Questions presented for review are:

The Salient Issues:

1. Can Federally licensed engineer-announcers placed in charge of public broadcasting stations, pursuant to Federal Law, take the stations off the air by destroying the electronic signals, without notice to or approval of (a) the Federal Communications Commission, (b) the station owner and licensee or, (c) the public, as an unnecessary coercive incident to a walkout and still be entitled to compulsory rehiring, discharge of replacement engineer-announcers and back pay?

2. Does the National Labor Relations Act give the right to unions and their members to shut down the Federally licensed and regulated communications system of the United States at their whim without notice irrespective of other laws including the Federal Communications Act and regulations thereunder and state criminal statutes?

The Corollary Issues:

3. Is the unnecessary and willful destruction of a radio station signal and the issuing of false and misleading sign-off announcements during the station's regular broadcasting day, without notice, sufficient grounds for discharge under the National Labor Relations Act?

4. Is the order of the NLRB directing Respondent Federally licensed radio stations, to discharge, if necessary, current engineer-announcers and to rehire specified ("charging parties" below) engineer-announcers an unconstitutional interference with free speech?

5. Is the order of the NLRB directing Respondent to pay "back wages" to engineer-announcers an uncon-

stitutional deprivation of (a) the right to a jury trial, (b) equal protection of the law and (c) due process, both procedurally and substantively?

6. Is the order of the NLRB directing Respondent to discharge current engineer-announcers an unconstitutional (a) deprivation of due process, (b) the taking of property without just compensation, (c) impairing the obligations of contract?

7. Do the acts of the complaining engineer-announcers herein *under the circumstances of this case* and under Federal and state law constitute such professional disloyalty and unreliability as to render the Board's order of compulsory reinstatement and back pay an interference with management prerogatives and licensee responsibilities contrary to the National Labor Relations Act, the Federal Communications Act and established equitable principles?

8. Does the application of Local Rule 14 by the Eighth Circuit Court of Appeals to this case constitute a violation of Section 160 by effectively denying the review contemplated by Congress in Section 160 of Title 29 U.S.C., and is it a denial of due process of law in that there is no intelligible, public, non-cloistered consideration of important issues; it does not inform Petitioner of its rights and duties in this case and is ultimately so vague, uncertain and secret as to amount to a denial of review.

(d) Constitutional provisions, statutes and regulations which the case involves are: Article 1, Section 9 of the U.S. Constitution; Amendments V, VII and IX to the U.S. Constitution; 18 U.S.C. 1343; 29 U.S.C. 160; 47 U.S.C. 151,

301, 303, 307, 312; FCC Form 303 R; Federal Communications Commission Rules and Regulations 13.1, 13.7, 13.61, 13.62, 13.63, 13.64, 13.65, 13.66, 13.67, 13.68, 13.69, 73.93, 73.901, 73.902, 73.913, 73.916, 73.925, 73.931, 73.932, 73.935, 73.936, 73.937, 73.961.

(e) The FCC licensed engineer-announcers involved in this case were substantially the entire engineer-announcer staff of two radio stations. Engineer-announcers, while on duty, were unsupervised 100 per cent of the time. Over 90 per cent of the time they were alone on the stations' premises and exercised total managerial prerogatives, acting in place of the licensee. They functioned in a close fiduciary relationship not only to the stations' owners, but to the public and the Federal Communications Commission as well.

The following is a concise statement of the acts of the union and complaining parties and relevant Federal Communications Commission Regulations:

1. Refusal to make a demand or give management any opportunity to avoid the strike or destruction of broadcast signals;

2. Failure to give a reasonable warning that a strike was to occur;

3. A destruction of the stations' electronic signals without warning (at least a tortious interference and, at worst, a serious criminal act in violation of the Minnesota Criminal Statutes relating to destruction of property);

4. Carrying out the destruction with a planned and willful secrecy so as to seriously damage or destroy business of innocent advertisers and without giving those advertisers any prior notice;

5. Preparing and delivering a false, fraudulent and misleading sign-off statement contrary to Federal Communications Regulations;

6. Once having turned the stations off, they refused to turn them back on when asked to and knowing that they would have to be replaced by other engineer-announcers in order for the stations to protect their licenses;

7. Manifestation of personal animosity toward the station manager, having the admitted desire as a primary aim of the "strikers" to take over the management of the stations;

8. There were threats and intimidations to other employees and to General Manager Rock relative to loss of jobs, firing, shooting, coercion while on the picket line and threats to beat up the station manager;

9. Notices were sent out questioning the competency of the stations' management, the integrity of the stations' management, and making fraudulent representations to the stations' advertisers;

10. Admitting at the hearing that their intention was to secretly destroy the stations' signals;

11. That the National Labor Relations Act was used for coercion to either bring about the firing of the stations' general manager or to interfere with his managerial authority; and,

12. To pervert the basic purpose of the National Labor Relations Act by using it as a shield for basic acts of disloyalty.

In spite of these acts of disloyalty and irresponsibility, the Eighth Circuit Court of Appeals ordered discharge of current loyal and responsible engineer-announcers, reinstatement of those who conspired to destroy the stations and harm the public interest and rewarded the conspirators with a back pay order, in effect ordering the Petitioner to turn over "control" of its property.

(f) Not applicable.

(g) The basis for the original federal jurisdiction is the National Labor Relations Act, 29 U.S.C. 160.

(h) Important federal questions which should be settled: Succinctly stated, the broad issue is: *The Public's Interest in Free Communication and in the Peaceful Settlement of Labor Problems Involving Public Broadcasting Facilities.*

This case presents a monumental confrontation between the public's right to free access to its federally protected communication system and the National Labor Relations Board's determination that this right does not exist in a claimed labor dispute.

Over the years the decisions of the National Labor Relations Board clearly establish its propensity to bend facts, logic and the National Labor Relations Act to the breaking point to overlook unreasonable and unnecessary employee disloyalty, dishonesty and invasions of managerial prerogative.

The public's right to free communication under the Federal Communications Act has been totally undermined by the union (AFTRA) and the complainants involved. There is not one scintilla of evidence in or out of the record to jus-

tify the shut-down of these radio stations by the union as a reasonable device to maintain labor peace. (The avowed purpose of the National Labor Relations Act.)

Obviously, this was a test device of labor warfare—not peace.

Thus, the union and its members arrogantly defy the American public's right to free communication and its right to have the National Labor Relations Act administered as an aid to peaceful settlements of labor disputes, not as a dictatorial bludgeon in the hands of the irresponsible.

The NLRB, covetous as are all government agencies of their power and ever alert for a chance to expand their functions, has not only approved labor's right to destroy our communications system and rewarded the guilty with reinstatement and back pay but the Board has supererogated to itself the position of absolute authority as to when and under what circumstances this awesome power can be exercised. In short, the power to totally destroy our communications system has been given to labor unions without due process of law.

There simply is no rational statutory language in either the Federal Communications Act, the National Labor Relations Act or the United States Constitution to justify such a usurpation by the National Labor Relations Board.

If the weapon of potential control of our entire communications system is given to the NLRB and the labor movement, one can assuredly conclude its continued and expanded use and the concomitant destruction of our free public communications system.

To say that such a holding would have a "chilling effect" on freedom of speech would be a gross understatement.

Already the National Labor Relations Board and the

Federal Communications Commission are working together to further control management and licensees by adding a question in license renewal applications relative to unsettled labor disputes! (See FCC 1976 Application for License Renewal, Petition Appendix, P. 2)

What will tomorrow bring?

Intentionally Malicious and Unnecessary Deprivation of Public's Right to Free Communication As An Instrument of Labor Warfare.

The Federal Communications Commission requires in the public interest, necessity and convenience that broadcasting stations remain on the air in accordance with the requirements of their broadcasting licenses and Federal Communications Commission Regulations. The engineer-announcers herein who withheld their services and shut the stations off the air knew that the Federal Communications Commission requires a first-class licensed engineer at the AM station at all times during broadcasting and a third-class licensed engineer at the FM station at all times during broadcasting. They also knew that they would have to be replaced immediately, as neither Mr. Rock (the General Manager) nor the other employees had F.C.C. licenses, or the licensee would run the risk of losing its broadcasting licenses and destruction of its businesses. Each of the engineer-announcers who withheld their services and put the stations off the air possess either a first-class or a third-class engineer's license. *It is uncontested that these engineer-announcers are charged with the responsibility of management and ownership of the radio stations to the public and the Federal Communications Commission.* Fur-

thermore, that the engineer-announcers act as station managers when they are on duty and have absolute control over the radio stations and as to what goes over the air. (See citations supra.)

The key question framed in the background of the public's and management's rights is—Are engineer-announcers who knew that they were endangering the owner's Federal Communications Commission licenses by committing basic acts of disloyalty in destroying the stations' electronic signals and shutting the stations down without warning and otherwise violating the Federal Communications Act and regulations thereunder, and who further knew that the management would have to replace them immediately or face the reasonable possibility of loss of the radio stations' licenses and *who were further given the opportunity to put and maintain the stations back on the air without otherwise interfering with their "strike"* before they were replaced, entitled to reinstatement, back pay and compulsory discharge of good faith replacements?

In essence, the Board and the Eighth Circuit Court of Appeals found that all Federal Communications Act provisions as well as regulations pertinent thereto, as well as criminal law (both state and federal), even though willfully and maliciously violated by the complainants, are immaterial to the complainants' reemployability and back pay claims. (See App. Pp. 59-67; 83-92; 67-72.)

Thus, holding that neither management, the public or the licensee has the legitimate right to free and unfettered communication. (See Trans. Pp. 54-91; 97-103; 132-156. 163-165; 182-199; 212-215; 230-260; 263-265; 276-291; 295-308; 325-339; 340-342; 359-384; 390-391; 405-437; and, citations in Revised Statement of Case supra re: Federal

Communications Act and Regulations.) *Here, the federally-granted licenses to broadcast were in imminent danger of destruction as were personal and property rights of innocent third parties dependent upon the continuation of the radio stations' electronic signals.* The intentional and malicious and totally unnecessary timing of the strike to maximize this damage was also ignored by the Circuit Court.

The entire concept of the employer's awareness of its public responsibility and honest belief that the very existence of his business was in danger because management personnel did not possess Federal Communications Commission engineering licenses to operate the radio stations at the time the engineers were asked to return to work was totally disregarded by the Board and the Circuit Court contrary to the National Labor Relations Act, 29 U.S.C. 160 (c):

> "No order of the Board shall require the reinstatement of any individual . . . or the payment to him of any back pay, if such individual was suspended or discharged for cause."

The complaining parties herein during the hearing in this case openly threaten to shut the radio stations down anytime they desire if given the chance again. (See Trans. Pp. 1167-1177.)

The order to rehire, discharge and pay back wages is an unjustified punishment for management's having the audacity to abide by its Federal Communications Commission obligations and protect its licenses and right to do business.

The American public has a right to rely on the operation of its public communication system under the Federal Communications Act and the appropriate regulations is-

sued thereunder. The inherent danger to the stability, independence and efficiency of this system, if it can be interrupted at will by unions or employees without reasonable notice, can be devastating. The interruption of radio signals without restriction or responsibility, as a tool of economic coercion protected under the National Labor Relations Act, is without rational justification.

Specific Disloyalty Under the Federal Communications Act and Other Laws.

Conspiring secretly to shut off the Respondent's radio stations without reason and airing false sign-offs without warning, is such an act of disloyalty under these circumstances as to preclude, at the very least, compulsory rehiring and back pay. Such an order of reinstatement and the firing of current employees is a basic interference with business operation so as to effectively curtail management's rights and prerogatives and endanger its capacity to manage and therefore cannot serve the basic purposes of the Act. Therefore, the Board and, by implication, the Eighth Circuit Court, erred in making a bland assertion (without any reasonable evidence to support it) that the charging parties should be reinstated with back pay.

The function of the Federal Communications Act, the Emergency Broadcasting System, Subpart G of Section 73 of the Rules and Regulations, Part 13 of the Rules and Regulations, those portions of Section 73 having to do with operating requirements, 47 U.S.C.A., Sections 151, 152, 301, 303, 312, 318 and 506, and 18 U.S.C.A. 1343 is to protect the public interest in a free, open and reliable communications system. The engineer-announcers are put in statutory charge of a radio station at all times. National

disasters, navigation of aircraft and other public interests, *at the very least, demand that engineer-announcers complete their duty assignments before striking; that they give reasonable notice to either the Commission or their employers that they will not report for their duty assignments;* and, that they otherwise abide by the rules and regulations cited and brought to your attention as having been violated. The violations involve false signals, interference with signals, program log omissions and misrepresentations, etc. If the Federal Communications Act does not require reasonable notice prior to destroying the electronic signals of our communications systems and does not require the engineers to otherwise abide by its regulations when they are engaged in "union activities" then the public control of our radio and televisions systems has de facto been transferred to the National Labor Relations Board and the unions of America without due process of law.

These violations, the Respondent also contends, were clearly the basis of the suspension and/or discharge of the engineer-announcers who refused to return the stations to operation and to otherwise abide by the Federal Communications Commission Law and Regulations, therefore, negating any order of the Board requiring reinstatement as being contrary to 29 U.S.C.A. 160, subsection c.

Further, management contends that under Minnesota Statutes Section 609.595, the destruction of the electronic signals amounted to a criminal violation constituting a felony under Subsection (2):

> "(2) . . . the property damaged belongs to a public utility or a common carrier and the damage impairs the service to the public rendered by them;
>
> (3) The damage reduces the value of the property by more than $100.00 . . ."

Whatever view one takes of the law or the uncontradicted facts in this case, the engineer-announcers and their union have committed such fundamental and basic acts of disloyalty from the inception of this case so as to negate whatever rights for reinstatement and back wages they might otherwise have had. The evidence of their conduct in the original hearing and the essentially uncontraverted testimony offered in Transcript, Pages 760-1225, clearly establish bad faith, secondary boycotts, willful and malicious attempts to destroy Respondent's business and violations of the Federal Communications Act and pertinent Regulations thereunder so as to make the reemployment of the engineer-announcers and payment of back pay inappropriate under the "circumstances of this case", under the pertinent provisions of the National Labor Relations Act, the Federal Communications Act and pertinent Regulations under Minnesota Statutes (Criminal) 609.595 and also under 47 U.S.C.A. 506, Subsection a (4).

The Board, union and complainants offered substantially no rebuttal to Respondent's evidence on remand. Thus, Respondent's rebuttal evidence stands uncontradicted on disloyalty and non-reemployability. The complainants even admitted that they are ready to shut the stations down again if the "mood" is right and they are reinstated. See Transcript Page 1167:

> "Q. (By Mr. Williams) . . . you stated that if you were given your job back, you feel that you could go back and work with people at KTCR-AM and FM without any difficulty. Now being perfectly fair to yourself as well as to management, how could management know that any time that you were alone at the radio station that you would not, in a disgruntled mood for some reason or another, decide that you could turn the radio station off again.

> A. I don't think I decided that for a mood that wasn't forced upon me.
> Q. So that what you're saying is that if you ever felt that things were forced upon you again when you were working for the radio stations, you'd turn the radion station off again?
> A. I'm saying under the same circumstances, anywhere I would do it.
> Q. You'd do it all over again?
> A. Yeah."

The only witness who testified on behalf of the union, Board or complainants on remand clearly admitted the bad faith and disloyalty of the complainants, when he testified in essence that the radio stations could be shut off anytime the "mood" dictated it, that the complainants have the right to shut the stations off anytime they want to, that he doesn't care if the stations ever went back on the air, nor do the complainants care about the owner's rights. Of course, the Board and the Circuit Court ignored this evidence but it is difficult to justify affirming a rehiring and back pay order in the face of this crude and unprincipled disloyalty. See cross-examination of Gregory Ellsworth, Trans., Pp. 1167-1177. See especially at Page 1173:

> "Q. You didn't care if it (the two radio stations) ever went back on?
> A. It's not my concern."

The answer "It's not my concern" summarizes the complete indifference to their jobs and their employers shown by the complaining parties.

Constitutionality of The Order And The Proceedings.

A. Free speech.

1. By compelling the Respondent to rehire and place the complaining engineer-announcers who originally issued false and fraudulent sign-off statements in control of the radio broadcasting stations without defining management's prerogatives, including the right to control the content of the broadcasts, the Board has not only seriously infringed Respondent's owners and management's right of free speech, but it (the N.L.R.B.) has by decree made the Respondent responsible for the statements of the engineer-announcers over whom its managerial control has been negated.

2. The discussion that occurred between Respondent's employees which have been held by the Board to be "coercive" without evidentiary justification, if allowed to stand under the circumstances of this case substantially impinge the rights of free speech guaranteed under the 1st Amendment to the United States Constitution.

B. Right to jury trial, equal protection and due process.

By ordering back wages without citing a rational standard either legally or factually, the Board has deprived the Respondent of equal protection of the law (employers dealing with non-union employees claiming legal rights arising out of the employment contract have a right to a jury trial, discovery proceedings and proper notice of nature and extent of claim to allow both procedural and substantive due process) jury trial protection on money damages, and due

process as the same are enshrined in Amendments VII, IX and V to the U.S. Constitution, Article 1, Sec. 9 ex post facto law (in effect).

C. Due process, equal protection, ex post facto effect, taking property without just compensation.

That portion of the Board's order directing the discharge of engineer-announcers currently "in charge" of the Respondents radio stations is totally without constitutional authority and violates every fundamental concept of our Republic. Consider:

1. No notice of any nature to engineer-announcers who will be replaced;

2. No recognition of current engineer-announcers' constitutionally guaranteed civil rights whatsoever;

3. No standing to participate in the proceeding;

4. Negates contractual relationships automatically without even a facade of due process, in form an ex post facto decree;

5. Deprives current engineer-announcers of property without compensation.
(See Amendments VII, IX and V and Article 1, Sec. 9 of U.S. Constitution.)

The use of Rule 14 by the Eighth Circuit deprives this Petitioners of his statutory and constitutional right to due process.

The Petitioner has no rational method of determining whether or not any of the issues have been considered and, if considered, what his rights and duties are!

The application of Rule 14 in this case makes a mockery of appellate due process.

See Appendix, P. 1

Summary and Conclusion

That the motive that this "strike" and the irresponsible destruction of the stations' signals were not to rectify an unfair labor practice but rather to vent personal spleens against an unpopular general manager and pervert the purpose of the National Labor Relations Act are the only logical conclusions to be drawn from the uncontradicted and admitted facts! To-wit:

A. At *NO* time was the Respondent asked to rehire Carey as a condition of terminating the strike or otherwise!

B. At no time did the union, its "members" or Carey ask management to rehire Carey.

C. Whatever the motives for the stations' shut down, the union and its "members" admitted they were secret.

Now knowing under what circumstances these engineer-announcers would again, without warning, shut the stations off the air, endangering the valuable licenses, harming the innocent public for whose interest and convenience the licenses were issued, and interfering with the conduct of the business of the non-involved advertisers, no rational management would turn the operation of these stations over to such unreliable and unpredictable managerial fiduciaries. We must always bear in mind that the Federal Communications Act and Regulations thereunder place these engineer-announcers in sole "charge" of the stations during their duty hours. Because of the obvious inherent dangers of another shut down in rehiring these engineer-announc-

ers, at the very least, management was entitled to a clear definitive statement from the Board and the Eight Circuit Court as to the conditions under which the engineer-announcers could shut the stations down without managerial approval and notice under the National Labor Relations Act and the engineer-announcers' acceptance of these definitive restrictions, as a condition precedent to compulsory rehiring and payment of back wages only from the date of the acceptance by the complainants of rational limitations to shut down the stations.

The union and its members claim an absolute right to shut down the stations at their whim without notice at any time as a routine incident to their bargaining rights under the Act. See Trans., Pp. 810-815; 1111-1118; 1173-1177; 1122; 1180; 1181.) This claim is upheld by the Board and the Circuit Court decisions below.

This is by far the single most important issue to be decided by this Court. Its importance to this Petitioner, the entire communications inudstry and the American public cannot be over-emphasized!

Therefore, the Circuit Court's order of enforcement relative to reinstatement and back pay under the circumstances of this case is arbitrary, capricious and oppressive as it effectually passes control of our broadcasting media from the public, the licensees and the Federal Communications Commission to the unions.

The other acts of disloyalty, attempted destruction of business, secondary boycotts and managerial interference under the conspiratorial aegis of the union and the concomitant hypocritical perverse use of the National Labor Relations Act compels the setting aside of the bargaining order.

Further, the Eighth Circuit Court of Appeals should be ordered to constitutionally restrict its use of Local Rule 14 so as to provide full disclosure as to the basis of its decision.

Respectfully submitted,

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PETITION APPENDIX

Article 1, Section 9, United States Constitution:

". . . No bill of Attainder or ex post facto Law shall be passed. . ."

Amendment [V], United States Constitution:

"No person shall be . . . deprived of . . . property, without due process of law; nor shall private property be taken for public use, without just compensation."

Amendment [VII], United States Constitution:

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

Amendment [IX], United States Constitution:

"The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

United States Court of Appeals for the Eighth Circuit

"Rule 14. AFFIRMED OR ENFORCED WITHOUT OPINION.

When the court determines that any one or more of the following circumstances exists and is dispositive of a mat-

ter submitted to the court for decision: (1) that a judgment of the district court is based on findings of fact which are not clearly erroneous; (2) that the evidence in support of a jury verdict is not insufficient; (3) that the order of an administrative agency is supported by substantial evidence on the record as a whole; (4) that no error of law appears; and the court also determines that an opinion would have no precedential value, the judgment or order may be affirmed or endorsed without opinion.

In such case the court may in its discretion enter either of the following orders: "AFFIRMED. See Rule 14," or ENFORCED. See Rule 14."

"FCC Form 303 R — Approved by GAO B180227 (RO372)

UNITED STATES OF AMERICA
FEDERAL COMMUNICATIONS COMMISSION

Application for Renewal of License for Commercial AM or FM Radio Broadcasting Station

. . . . 7. Since filing of applicants last renewal application, has an adverse finding been made . . . to the applicant or parties to the application . . . confirming any civil . . . action or proceeding brought under the provisions of any federal . . . law relating to . . . unfair labor practices or discrimination . . . Attach. . . . a full description including identification of the court or administrative body, the proceeding by file number the person and matters involved and the disposition of the litigation . . ."

Title 47 U.S.C. 312

"Administrative Sanctions—Revocation of Station License or Construction Permit

(a) The Commission may revoke any state license or construction permit . . .

(4) for willful or repeated violations of or willful or repeated failure to observe any provision of this chapter or any rule or regulation of the Commission . . .

(6) for violation of Section . . . . 1343 . . . of Title 18 . . ."

Title 18 U.S.C. 1343—Fraud by wire or television.

Whoever having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communications in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than five years, or both. Added July 16, 1952, c.879, Sec. 18 (a), 66 Stat. 722, and amended July 11, 1956, C.561, 70 Stat. 523."

Title 47 U.S.C. 307—"Licenses; etc.

. . . Public convenience, interest or necessity will be served thereby . . ."

Title 47 U.S.C. 151—Purpose. . .

. . . national defense, . . . promoting safety of life and property . . . through the use of . . . communications . . ."

Title 47 U.S.C. 301—"License for radio communication or transmission . . .

. . . provide for use . . . but not ownership . . . limited period . . .

. . . No person shall use or operate any apparatus . . . except under and in accord with this Chapter and with a license . . ."

---

47 U.S.C. 303—"Powers and duties of Commission

. . . suspend the license of any operator . . . that the licensee . . .

(B) has failed to carry out a lawful order of the master or person lawfully in charge of the ship or aircraft on which he is employed; or . . .

(D) has transmitted superfluous radio communications . . . or has knowingly transmitted—

(i) false or deceptive signals or communications or . . .

(E) has willfully and maliciously interfered with any other radio communications or signals . . ."

Title 47 U.S.C. 318—"Transmitting apparatus; operator's license

The actual operation of all transmitting apparatus in any radio station for which a station license is required by this

chapter shall be carried on only by a person holding an operator's license issued hereunder, and no person shall operate any such apparatus in such station except under and in accordance with an operator's license issued to him by the Commission."

RULES AND REGULATIONS

Part 13 Commercial Radio Operators
April 1974

FEDERAL COMMUNICATIONS COMMISSION

General

§13.1 Licensed operators required.

. . . the actual operation of any radio station for which a station license is required shall be carried on only by a licensed radio operator of the required class (see §13.61).

. . .

§13.7 Operators, place of duty.

. . . one or more licensed radio operators of the grade specified by this part shall be on duty at the place where the transmitting apparatus of each licensed radio station is located and in actual charge thereof whenever it is being operated . . .

Scope of Authority

§13.61 Operating authority.

The various classes of commercial radio operator licenses issued by the Commission authorize the holders thereof to operate radio stations, except amateur, as follows (See also

§13.62(c) for additional operating authority with respect to standard and FM broadcast stations): . . .

§13.62 Special privileges.

In addition to the operating authority granted under §13.61, the following special privileges are granted the holders of commercial radio operator licenses: . . .

§13.63 Operator's responsibility.

The licensed operator responsible . . . provided that he shall not be relieved thereby from responsibility for the proper operation of the equipment.

§13.64 Obedience to lawful orders.

All licensed operators shall obey and carry out the lawful orders of the master or person lawfully in charge of the ship or aircraft on which they are employed.

§13.65 Damage to apparatus.

No licensed radio operator shall willfully damage, or cause or permit to be damaged, any radio apparatus or installation in any licensed radio station.

§13.66 Unnecessary, unidentified, or superfluous communications.

No licensed radio operator shall transmit unnecessary, unidentified, or superfluous radio communications or signals.

§13.67 Obscenity, indecency, profanity.

§13.68 False signals.

No licensed operator shall transmit false or deceptive signals or communications by radio, or any call letter or signal which has not been assigned by proper authority to the radio station he is operating.

§13.69 Interference.

No licensed radio operator shall willfully or maliciously interfere with or cause interference to any radio communication or signal.

§73.93 Operator requirements.

(a) One or more operators holding a radio operator license or permit of a grade specified in this section *shall be in actual charge* of the transmitting system, and shall be on duty . . . at the transmitter location . . . (Emphasis ours)

(e) A station using a directional antenna system, which is required by the station authorization to maintain the ratio of the currents in the elements of the system within a tolerance which is less than 5 percent of the relative phases of those currents within a tolerance which is less than 3° shall, without exception, employ first-class radiotelephone operators who *shall be on duty and in actual charge* of the transmitting system *as specified in paragraph (a)* of this section *during hours of operation* with a directional radiation pattern. (Emphasis ours.) . . .

SUBPART G - EMERGENCY BROADCAST SYSTEM

§73.901 . . .

The subpart contains rules and regulations providing for an Emergency Broadcast System. . . .

§73.902 . . .

are to provide a means for the distribution of Emergency Action Notifications . . . for the purpose of providing the President and the Federal government, as well as heads of State and local governments, or their designated representatives, with a means of communicating with the general public. . . .

§73.913 Basic Emergency Broadcast System (EBS) plan.

The basic EBS Plan contains guidance to all non-government entities for the distribution of emergency information and instructions covering a broad range of emergency contingencies posing a threat to the safety of life or property. . . .

§73.916 Emergency Broadcast System (EBS) Authorization. . . .

(b) Authorizations are issued to one or more broadcast stations for participation in the National-Level EBS as Primary or Alternate Stations or Primary Relay or Alternate Relay Stations.

. . .

§73.925 Emergency Broadcast System (EBS) Programming Priorities

. . .

(b) Participating stations that remain on the air during a National emergency situation must carry Presidential Messages "live" at the time of transmission. . . .

(c) During a National emergency the Radio and Television (aural) Broadcast Network program distribution facilities shall be reserved exclusively for the distribution of

Presidential Messages and National Programming and News, . . .

Emergency Actions

§73.931 Dissemination of Emergency Action Notification.

(a) National-Level. The Emergency Action Notification (EAN) will be released at this level upon request of the White House.

. . .

§73.932 Radio Monitoring Requirement.

(a) TO INSURE EFFECTIVE OFF-THE-AIR MONITORING (§73.931(a) (3) ALL BROADCAST STATION LICENSEES MUST INSTALL AND OPERATE, DURING THEIR HOURS OF BROADCAST OPERATION, EQUIPMENT CAPABLE OF RECEIVING EMERGENCY ACTION NOTIFICATIONS AND TERMINATIONS TRANSMITTED BY OTHER RADIO BROADCAST STATIONS. THIS EQUIPMENT MUST BE MAINTAINED IN OPERATIVE CONDITION, INCLUDING ARRANGEMENTS FOR HUMAN LISTENING WATCH OR AUTOMATIC ALARM DEVICES, AND SHALL HAVE ITS TERMINATION AT EACH TRANSMITTER CONTROL POINT. WHERE MORE THAN ONE BROADCAST TRANSMITTER IS CONTROLLED FROM A COMMON POINT BY THE SAME OPERATOR, ONLY ONE RECEIVER IS REQUIRED AT THAT POINT. (Emphasis ours) . . .

DAY-TO-DAY EMERGENCY OPERATION

§73.935 Day-To-Day Emergencies Posing a Threat to the Safety of Life and Property; State-Level and Operational (Local) Area-Level Emergency Action Notification.

. . .

§73.936 Emergency Broadcast System (EBS) Operation During a State-Level Emergency.

. . .

§73.937 Emergency Broadcast System (EBS) Operation During An Operational (Local) Area Emergency.

. . .

TESTS

§73.961 Tests of the Emergency Broadcast System Procedures.

Tests of the EBS procedures will be made at regular intervals with appropriate entries in the station operating log, as follows . . ."

Title 29 U.S.C. 160 . . .

"(c) No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of back pay, if such individual was suspended or discharged for cause."

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215 NLRB No. 32

MJK
D—9260
Minneapolis, Minn.

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

HENNEPIN BROADCASTING ASSOCIATES, INC.,
AND
AMERICAN FEDERATION OF TELEVISION AND RADIO ARTISTS, TWIN CITY LOCAL, AFL—CIO

Case 18—CA—3908

DECISION AND ORDER

On February 11, 1974, Administrative Law Judge James T. Rasbury issued the attached Decision in this proceeding. Thereafter, Respondent and the General Counsel filed exceptions and supporting briefs.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order as modified herein.[1]

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[1]The request by the Respondent for oral argument is hereby denied as the record, including the briefs, adequately presents the issues and positions of the parties.

Respondent operates two radio stations at separate locations in the Minneapolis area. In early June 1973[2] Respondent employed 10 announcer-engineers at its two stations. Following discussions among these employees about the feasibility of having a union represent them, two employees, Carey and Ellsworth, arranged a meeting with the Union at Carey's house on June 10. The meeting was attended by 7 of the 10 employees. By June 14 all seven of these employees had signed authorization cards.[3] On June 15, the Union in a letter to Respondent stated that the Union represented a majority of Respondent's employees and demanded recognition. The Union also filed a petition for an election with the Board on June 18. The allegations presented in this case essentially arise from Respondent's conduct during the period June 18-22.

We agree with the findings by the Administrative Law Judge that Respondent violated Section 8(a)(1) by (1) interrogating employees on June 18 about their knowledge or interest in the Union without adequate safeguards or assurances against reprisals; and (2) promising wage increases to employees Bortnem and Hubbard on June 20 and 21, respectively, intending thereby to frustrate and interfere with the employees' rights as guaranteed by Section 7 of the Act. We also agree with the Administrative Law Judge's conclusion that employee Carey was discharged on June 21 solely because Respondent believed him to be the one responsible for promoting the Union's organizational campaign and that the reasons offered by Respondent as justification for Carey's discharge were purely pretextual. In view of this conclusion, we find it unnecessary to consider or adopt the Administrative Law Judge's further conclusion that, even under an application of a mixed motive theory, Carey's discharge would still be unlawful.

[3]These seven employees included Gustafson, McKeever, Hubbard, Bortnem, Ellsworth, Peterson, and Carey. Employee Walby signed a card on July 6. Only one employee in the unit found to be appropriate by the Administrative Law Judge, which finding we adopt, did not sign a card.

[2]All dates hereafter are 1973.

The Administrative Law Judge found and we agree that, because of Carey's discharge, Respondent's employees commenced an unfair labor practice strike and picketed at the two radio stations on June 22. Shortly thereafter, Respondent's vice president, Rock, appeared first at one and then the other radio station and ordered the picketing employees to return to work or face immediate discharge. The employees refused to return to work and Respondent discharged them. We adopt the Administrative Law Judge's finding that the picketing employees were engaged in a legal work stoppage and that their discharge violated Section 8(a)(1) of the Act. For the reasons described *infra*, we find that the discharge of the striking employees also violated Section 8(a)(3) of the Act.

The record shows that the strike and picketing commenced just 4 days after Respondent received the Union's letter demanding recognition and the filing of the election petition. As described *supra*, Respondent found time during the intervening 4-day period to unlawfully interrogate employees concerning the Union, make unlawful promises of wage increases to two employees, and unlawfully discharge a known and active union adherent. This conduct reveals a vigorous effort by the Respondent to influence and coerce its employees to abandon their efforts to have the Union represent them. In these circumstances, it is clear that Respondent's action in discharging the striking em-

ployees also had the effect of discouraging membership in the Union and, thus, the discharges must be deemed to be violative of both Section 8(a)(3) and Section 8(a)(1) of the Act.

The General Counsel has filed exceptions to the Administrative Law Judge's failure to make certain additional findings and conclusions of law related to the discharge and reinstatement of the striking employees. We find merit in these exceptions inasmuch as they are directed at what appear to be inadvertent omissions by the Administrative Law Judge in view of his other findings regarding these same employees and his recommended order which provides for reinstatement of them. Specifically, we find, therefore, that Richard Campbell joined the strike on June 23 or 24 and thereby became an unfair labor practice striker, and that by refusing to reinstate unfair labor practice strikers Bortnem, Ellsworth, Gustafson, Peterson, McKeever, Hubbard, Walby, and Campbell on June 26 and on August 16, Respondent violated Section 8(a)(3) and (1) of the Act.

Finally, we do not adopt the Administrative Law Judge's finding that Respondent violated Section 8(a)(5) of the Act, for the reasons stated in *Steel-Fab, Inc.*, 212 NLRB No. 25 (1974).[4] In view of the serious unfair labor practices committed by the Respondent, we do, however, enter a bargaining order as a remedy.

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[4]For the reasons set forth in his concurring and dissenting opinion in *Steel-Fab*, Member Jenkins would find a violation of Sec. 8(a)(5) as well as entering a bargaining order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge as modified below and hereby orders that Respondent, Hennepin Broadcasting Associates, Inc., Minneapolis, Minnesota, its officers, agents, successors, and assigns, shall take the action set forth in the recommended Order, as modified below:

1. Eliminate paragraph 1(d).

2. Substitute the following as paragraph 2(a):

"Upon request, recognize and bargain with American Federation of Television and Radio Artists, Twin City Local, AFL—CIO, as the exclusive bargaining representative of all full-time and regular part-time employees employed by the Respondent at its AM and FM radio stations located in the Greater Saint Paul-Minneapolis areas, who regularly are heard on the air, excluding office clerical employees, guards, and supervisors as defined in the Act, with respect to rates of pay, hours of employment, or other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement."

3. Substitute the attached notice for that of the Administrative Law Judge.

Dated, Washington, D.C. Dec. 6, 1974.

EDWARD B. MILLER
Chairman
HOWARD JENKINS, JR.
Member
RALPH E. KENNEDY
Member
NATIONAL LABOR RELATIONS BOARD

(Seal)

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

After a trial at which parties had the opportunity to give evidence, it has been decided that we, Hennepin Broadcasting Associates, Inc., have violated the National Labor Relations Act and we have been ordered to post this notice.

The National Labor Relations Act gives you, as employees, certain rights, including the right to support and join a labor union and to bargain through your representative without fear of discharge or other interference, restraint, coercion, or discrimination.

Accordingly we give you these assurances:

WE WILL, upon request, recognize and bargain with American Federation of Television and Radio Artists, Twin City Local, AFL—CIO, as the exclusive bargaining representative of all full-time and regular

part-time employees employed by the Respondent at its AM and FM radio stations located in the Greater Saint Paul-Minneapolis areas, who regularly are heard on the air, excluding office clerical employees, guards, and supervisors as defined in the Act, with respect to rates of pay, hours of employment, or other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

WE WILL offer to Rich Carey immediate and full reinstatement to his former position or, if such position no longer exists, to a substantially equivalent position, without prejudice to his seniority and other rights and privileges previously enjoyed, and make him whole for any loss of pay suffered by reason of his termination in the manner set forth in the section entitled "The Remedy."

WE WILL offer immediate and full reinstatement without prejudice to their seniority or other rights and privileges, dismissing, if necessary, any employee hired subsequent to the day the strike began, the following named employees: John Bortnem, Robert Gustafson, James Hubbard, Gregory Ellsworth, Gregory Peterson, Patrick McKeever, Raymond Walby, and Richard Campbell and make each of them whole for any loss he may have suffered as a result of our failure to reinstate each of them on or before July 4, 1973, in the manner set forth in the section entitled "The Remedy."

WE WILL NOT discourage membership in American Federation of Television and Radio Artists,

Twin City Local, AFL—CIO, or any other union by discharging or otherwise discriminating against any of our employees because of their union or concerted activity.

WE WILL NOT interrogate employees concerning their union activity or those of other employees.

WE WILL NOT promise employees wage increases on an individual basis tending to interfere with the employees in their rights to bargain collectively or otherwise engage in concerted activity.

WE WILL NOT in any manner interfere with, restrain, or coerce our employees in the exercise of their rights to self-organization, to form labor organizations, to join or assist the above-named union or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities.

Dated ———————

HENNEPIN BROADCASTING ASSOCIATES, INC.

By ———————

Representative

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 316 Federal Building, 110 South Fourth Street, Minneapolis, Minnesota 55401, Telephone 612-725-2611.

SUPPLEMENTAL DECISION AND ORDER

On December 6, 1976, the Board issued its Decision and Order[1] in this proceeding finding that Respondent had engaged in and was engaging in certain unfair labor practices and ordering that they cease and desist therefrom and take certain affirmative action. Thereafter, the General Counsel filed an application for enforcement of the Board's Decision and Order with the United States Court of Appeals for the Eighth Circuit. Respondent filed a motion to remand the case to the Board for the purpose of taking additional evidence. On March 21, 1975, the court granted Respondent's motion and on April 7, 1975, the court clarified its order remanding the case to the Board. On June 18, 1975, the Board accepted the remand and ordered that the record be reopened and a further hearing be conducted before an Administrative Law Judge in accordance with the court's remand.[2]

On January 20, 1976, Administrative Law Judge Nancy Sherman issued the attached Supplemental Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National La-

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[1]215 NLRB No. 32.

[2]It is noted that the court held in abeyance any decision on the merits of the Board's Decision and Order at 215 NLRB No. 32 until the record was supplemented in accordance with the remand.

bor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,[3] and conclusions of the Administrative Law Judge and to adopt her recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Hennepin Broadcasting Associates, Inc., Minneapolis, Minnesota, its officers, agents, successors, and assigns, shall take the action set forth in the Board's Decision and Order of December 6, 1974, at 215 NLRB No. 32.

Dated, Washington, D.C.

BETTY SOUTHARD MURPHY
Chairman
HOWARD JENKINS, JR.
Member
JOHN A. PENELLO
Member
NATIONAL LABOR RELATIONS BOARD

(Seal)

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[3]The Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an Administrative Law Judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (C.A. 3, 1951). We have carefully examined the record and find no basis for reversing her findings.

Application for Enforcement of Order of the National Labor Relations Board

Before LAY and STEPHENSON, Circuit Judges, and SMITH,* District Judge.

There is substantial evidence in the record on the whole supporting the Board's order which is, accordingly, enforced. See Local Rule 14.

February 16, 1977

Application for Enforcement of Order of National Labor Relations Board

The Court having considered petition for rehearing en banc filed by counsel for respondent and, being fully advised in the premises, it is ordered that the petition for rehearing en banc be, and it is hereby, denied.

Considering the petition for rehearing en banc as a petition for rehearing, it is ordered that the petition for rehearing also be, and it is hereby, denied.

March 11, 1977

*The Honorable Talbot Smith, Senior Judge, United States District Court for the Eastern District of Michigan, sitting by designation.